

1988

Bountiful City v. David W. Gemmill : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO.

886533 CA

IN THE UTAH COURT OF APPEALS

BOUNTIFUL CITY,

Plaintiff and Respondent,

vs.

DAVID W. GEMMILL,

Defendant and Appellant.

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Priority No. 2

Case No. 880533-CA

APPELLANT'S BRIEF

Appeal from the Judgment of the
Second Circuit Court Bountiful Department
In and for Davis County, State of Utah,
The Honorable S. Mark Johnson, Presiding

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FEB 27 1989

COURT OF APPEALS

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APPELLANT'S BRIEF

Case No.

JURISDICTION

The specific statutory authority that confers jurisdiction on the Utah Court of Appeals to decide this appeal is Utah Code Annotated, Section 78-2a-3(2)(c).

NATURE OF THE PROCEEDINGS

A trial on this matter was held in the Second Circuit Court Bountiful Department on July 12, 1988 wherein defendant was found guilty. Thereafter notice of appeal was timely filed.

STATEMENT OF THE ISSUES

Whether the trial court committed reversible error in giving its Instruction Numbers 7 and 8 which omitted an element of the offense as stated in this ordinance under which the defendant was convicted.

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES AND RULES

None.

STATEMENT OF THE CASE

Nature Of The Case

This is an appeal from a criminal conviction for driving under the influence of alcohol.

Course Of The Proceedings

A jury trial was held in the Second Circuit Court Bountiful Department from which this appeal is taken.

Disposition At Trial Court Or Agency

Defendant was convicted of driving while under the influence of alcohol.

STATEMENT OF THE FACTS

On March 8, 1988 Bountiful City Police Officer Michael Boyle observed the defendant at 500 South Main Street in Bountiful (see the record at page 3; hereafter R.3). Officer Boyle followed the defendant from that location to 1500 South Main (R.5). Officer Boyle testified that he had not observed anything unusual or any illegal conduct which would allow him to initiate a traffic stop on defendant (R.38-39). At this time Officer Boyle lost contact

with the defendant because Officer Boyle continued on down the road while the defendant pulled into a Maverick Store (R.5-6).

Approximatly one hour and ten minutes later Officer Boyle again observed the defendant (R.7). The location of the second sighting was 800 East and 500 South, Bountiful (R.7). Officer Boyle followed the defendant to approximately 500 South and Main where the defendant pulled into a parking lot (R.9). Officer Boyle testified that at this time he still had not observed any conduct by the defendant which would form a basis for a traffic stop (R.39-40). Officer Boyle again continued on past the defendant's location, however, this time he had communications with the dispatcher (R.10, 43). Because of these communications with the dispatcher Officer Boyle executed the traffic stop (R.44). Defendant was then arrested for Driving Under The Influence of Alcohol in violation of Bountiful City Ordinance NR 87-8 Section 8-4-501. No breath test was administered (R.19).

SUMMARY OF THE ARGUMENT

The ordinance under which defendant was convicted makes it illegal to operate a motor vehicle when one of the following two conditions are present: 1) "...if the person has a blood or breath alcohol concentration of .08 grams or greater..."; or 2) "...the person is under the influence of alcohol or any drug...to a degree which renders the person incapable of safely operating a vehicle." This being the law, the jury should have been instructed that it must find beyond a reasonable doubt one of the two essential

elements above in order to convict defendant. These two points are alternative elements. Failure to instruct the jury on these elements in the alternative constitutes reversible error.

ARGUMENT

The defendant in this case, David W. Gemmill, was charged with violating Bountiful City's ordinance number 87-8 Section 8-4-501 Driving Under the Influence of Alcohol or Drugs. Pursuant to a jury trial he was convicted of violating said ordinance.

During the course of the trial the court instructed the jury that there were three elements which the prosecution had to prove beyond a reasonable doubt. These three elements were enumerated in Instruction Number 7:

Before you can convict the defendant of the crime of Driving under the Influence of Alcohol you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime:

1. That on or about March 8, 1988 the defendant drove a motor vehicle.

2. That such driving was in Bountiful City, Davis County, State of Utah.

3. That at said time and place, the defendant was under the influence of intoxicating liquor.

If you are satisfied from the evidence that the State has proved beyond a reasonable doubt, each and every one of the above enumerated elements, you must find the defendant guilty as charged. On the other hand if the state has failed to satisfy your minds on one or more of the above enumerated elements, then you must find the defendant not guilty.

The Court used Instruction Number 8 by way of defining under the influence of intoxicating liquor:

One is under the influence of intoxicating liquor when, as a result of drinking thereof, his nervous system, brain or muscles, or his abilities of perception, coordination, or of will or judgment are so affected as to impair, to an appreciable degree, his ability to operate the vehicle with the degree of care which an ordinary prudent person in full possession of his faculties would exercise under similar circumstances.

The court reasoned that Instructions Number 7 and 8 taken together would adequately set out the elements of the offence (R.73). The Supreme Court of Utah in State v. Laine, 618 P.2d 33 (Utah 1980) reasoned that while all of the elements of the charged crime need not necessarily be contained in one instruction it is a good practice to do so.

Utah Code Annotated, 76-1-501(2)(a) defines element of the offense as follows:

The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

Bountiful City Ordinance NR 87-8 Section 8-4-501 states:

It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within the City if the person has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control, or if the person is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely operating a vehicle.

The conduct, attendant circumstances or results of conduct proscribed, prohibited, or forbidden in the definition of the

offense is to be determined from the ordinance itself. It is unlawful to operate a vehicle within the limits of Bountiful City if the operator has a blood or breath alcohol concentration of .08 grams or greater or if the operator is under the influence of alcohol to a degree which renders the person incapable of safely operating a vehicle.

The proscribed conduct is to operate a vehicle while one of two conditions exist: 1) having a blood or breath alcohol concentration of .08 grams or greater; or 2) being under the influence of alcohol to a degree which renders the person incapable of safely operating a vehicle. The jury was instructed in neither one of these elements. The courts reasoning that Instructions Number 7 and 8 combined accomplished this, fails to demonstrate how Instruction Number 8 explains any elements of the offense. The court's instruction to the jury only addressed a very general nebulous concept of being under the influence of alcohol while the ordinance is much more restrictive requiring that an operator be incapable of safely operating a vehicle.

Officer Boyle testified without contradiction that the defendant could and did operate his vehicle safely (R.37, 38, 39, 40 and 41). At no time did Officer Boyle observe conduct sufficiently serious to justify a traffic stop. One of the basic elements is that the defendant must be incapable of safely operating a vehicle. By the officer's own testimony the defendant was capable of safely operating a vehicle.

In Laine (supra at 35) the court stated that the general

rule is:

[a]n accurate instruction upon the basic elements of the offense charged is essential, and the failure to so instruct constitutes reversible error. Id. at 35. Accord e.g., State v. Jones, 657 P.2d 1263, 1267 (1982); Dougherty v. State, 471 P.2d 212, 213 (Nev. 1970); State v. Miller, 565 P.2d 228 (Kan. 1977); Thomas v. State, 527 P.2d 528 (Alaska 1974); State v. Puga, 510 P.2d 1075 (N.M.App.1973); 23A C.J.S. Criminal Law 51193.

The jury was not instructed that as part of the offense it must find the conditions existant pursuant to Instruction Number 8. Instruction Number 8 is inadequate and misleading if it is to be used to enunciate the simple element of "incapable of safely operating a vehicle." Clarity and simplicity would mandate the wording in the ordinance instead of the verbose approach used in Instruction Number 8.

There was no evidence introduced at trial which would lead a reasonable and prudent person to believe that defendant was incapable of safely operating a vehicle. As previously pointed out Officer Boyle clearly and consistantly testified to the contrary (R.44). The finality of the officer's judgment is unambiguous when the following exchange takes place at trial with regards to the officer's observation and interpretations of the driving pattern of defendant throughout the entire period of observation:

Q. At this point in time, though, you had observed nothing that was unsafe in the operation of the vehicle; is that correct? That's what you've testified to?

A. Yes. (R.44)

This is how the officer characterized defendant's driving after observing the defendant drive for a total of 18 blocks wherein the officer was looking for a reason to stop defendant (R.36-37).

This would then raise the question of how the jury interpreted the instructions from the court. In dealing with jury instructions the United States Supreme Court in Sandstrom v. State, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) the court stated that while a state court may be the final authority as to the weight of a (jury instruction containing a) presumption "it is not the final authority on the interpretation which a jury could have given the instruction." If there is a reasonable doubt as to how an instruction can be interpreted by a jury that doubt should be resolved in favor of the defendant. The court in Sandstrom (Id.) quoting In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970) said:

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Failure of the trial court to instruct the jury properly with regards to "every fact necessary to constitute the crime" is reversible error. Failure of the trial court to instruct the jury properly with regards to each specific element of the offense was a fundamental and plain error of constitutional proportions.


In summary, the errors of the instruction given to the

jury deprived the defendant of a fair trial. This is especially evident because of the uncontradicted evidence of defendant's violation free and safe driving. These errors require reversal of the trial courts determination.

CONCLUSION

Based upon the foregoing arguments defendant would ask that this Court reverse the decision of the trial court and dismiss this case or in the alternative to remand it back to the trial court for a new trial.

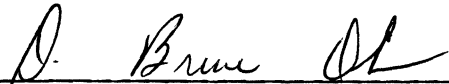
Respectfully submitted this 29 day of February 1989.



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CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing this 29 day of February, 1989, to Bountiful City Attorney, 745 South Main, Bountiful, Utah 84010.



A D D E N D U M

S T A T U T E S

Utah Code Annotated, 76-1-501(2)(a):

The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

Bountiful City Ordinance NR 87-8 Section 8-4-501:

It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within the City if the person has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control, or if the person is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely operating a vehicle.

T R A N S C R I P T

1 was just on routine patrol, patrolling the area.

2 Q Were you in uniform at the time?

3 A Yes. I was.

4 Q And were you in a marked patrol vehicle?

5 A Yes. I was.

6 Q And how did you come in contact with him or
7 observe him?

8 A Initially, I observed Mr. Gemmill stopped at a
9 red light, 500 South Main Street. At the time, Mr. Gemmill
10 was approximately 30 feet back from the stop line.

11 Q Was the light red, at the time?

12 A Yes. It was.

13 Q Were there any vehicles in front of him at that
14 point?

15 A No. There was not.

16 Q And what happened after that?

17 A As I approached the intersection, I was traveling
18 eastbound, Mr. Gemmill was traveling westbound in the left
19 turn lane. As I approached the intersection, the light
20 turned green. I continued through the intersection; however,
21 I watched Mr. Gemmill's vehicle from my rearview mirrors.

22 Q And then what happened?

23 A Mr. Gemmill started a left-hand turn on to Main
24 Street from 500 South. The turn was--he initiated the turn
25 approximately five to ten feet before the stop light--or

1 out into the traffic lane on Main Street southbound and
2 attempted to obtain a driving pattern, or watch Mr. Gemmill's
3 vehicle.

4 Q Let me back up just a minute. At the point where
5 he pulled off and you passed him by, prior to you turning
6 off at Ninth South, did you observe any cause or reason for
7 him to pull off to the side of the road?

8 A No. There was no reason for it.

9 Q Okay. And after he passed you at Ninth South and
10 you pulled in behind him, what happened then?

11 A I was unable to get a real good vantage point on
12 the vehicle from my position, due to the one between us. I
13 followed the vehicle, I noted at that time that we were
14 traveling between 18 and 20 miles per hour.

15 Q And what's the--this was southbound on Main Street?

16 A Yes. It was.

17 Q And what happened then?

18 A The vehicle between us turned off on to 1400 South.
19 I was able to get up behind Mr. Gemmill's vehicle, where I
20 could get an obviously better look or watch on the driving
21 pattern. We stopped at the intersection at 1500 South Main
22 Street and continued southbound on Main Street. As we were
23 passing the Maverick Station at--well, it's right on the
24 corner of 1500 South and Main Street, Mr. Gemmill quickly
25 pulled in to the Maverick Station. I continued southbound on

1 Main Street to approximately 1800 South, where I turned
2 around.

3 Q Okay. And after you turned around, what happened?

4 A I went back to see what Mr. Gemmill was going to
5 do, or what the vehicle was going to do, if it was going to
6 go into the store or what, but the time I got back, the
7 vehicle was gone.

8 Q And did you look for it?

9 A I did. I checked the area quite a bit. I let the
10 other cars on duty know, and we were unable to locate the
11 vehicle for quite some time.

12 Q Did you--about how long was it out of your sight?
13 That is, when it went--when the vehicle pulled into the
14 Maverick and you went down a ways, for about how long a
15 period of time was--did you lose contact?

16 A A minute to two minutes at the most.

17 Q Okay. Then--

18 MR. OLIVER: Your Honor--excuse me. Your Honor, if
19 I may, I failed to at the initial, and I don't believe this
20 would make any difference at this point, but I'd like to
21 invoke the exclusionary rule if I may.

22 MR. MAHAN: No objection.

23 THE COURT: Would you step out, Officer Kone until
24 you're called?

25 Q (By Mr. Mahan) After you had lost contact with him

1 and failed to locate that vehicle, did you later come in
2 contact with it?

3 A Yes, I did. Approximately 1240 hours in the
4 morning.

5 Q And which would have been, what, about an hour and
6 ten minutes after your initial contact?

7 A An hour, yes. Approximately an hour and ten
8 minutes.

9 Q And where did you see this--what kind of a vehicle
10 was it?

11 A It's a gray Suburu station wagon-type vehicle.

12 Q And did you--when you first saw the vehicle, did
13 you get the plate number?

14 A Yes. I did.

15 Q When you saw the vehicle later, what was it? What
16 was the appearance of that vehicle?

17 A That--the initial vehicle description matched when
18 I saw it, when it got closer, I was able to confirm that the
19 plate number was the same.

20 Q And in your opinion, was it the very same vehicle?

21 A Yes. It was.

22 Q And after you--where was it that you saw the
23 vehicle this second time?

24 A The second time, I observed the vehicle westbound
25 on 500 South, just east of 800 East, approximately 850 East.

1 18 to 20 miles per hour, then what happened?

2 A As we reached the intersection at 500 South and
3 400 East, the vehicle quickly jerked over into the right-
4 hand lane. It would have traveled normally into the inside
5 or the left lane, westbound. It made a quick jerking motion
6 to the right-hand lane and slowed down to approximately 15
7 miles per hour.

8 Q And then what happened?

9 A The entire time down Main Street, he was constantly
10 fluctuating with his speed; he was ranging between 15 to 28,
11 30 miles per hour, there was a constant fluctuation. I
12 believe he changed speeds three to four times within a very
13 short distance.

14 Q And then what occurred?

15 A As we reached approximately 75 East, the vehicle
16 rapidly slowed down. He was traveling around 25 miles per
17 hour, it rapidly slowed to ten to 15, estimation. Pulled
18 in behind me and across the travel lane in to the Albertson's
19 parking lot at approximately 50 East 500 South.

20 Q And that's--is that the Albertson's just right up
21 here on the corner?

22 A Yes. It is.

23 Q And after he pulled into the parking lot, what
24 happened?

25 A I continued on Main Street in to the American

1 Savings parking lot, over on 500 South Main Street. I had
2 some communication with my dispatcher at the time, and
3 both Corporal Kone and myself watched the vehicle for a
4 short period of time.

5 Q When did you encounter Corporal Kone? Where did
6 he become--how--when did he become involved, or where?

7 A I initially, when I located the vehicle the
8 second time, I had some radio communication with Corporal
9 Kone and advised him that I was following the vehicle. As
10 procedure, we normally try and call for a back-up officer on
11 any type of stop on a graveyard shift. I explained to him
12 where we were going to be, and where the stop would be.

13 Q Did he meet you at the American Savings parking
14 lot?

15 A No. Corporal Kone stayed in the Sessions Place,
16 Albertson's parking lot area.

17 Q Okay. And after you--after he pulled into the
18 parking lot of Albertson's, and you pulled in to American
19 Savings, then what happened?

20 A As I stated, we had some traffic with my dispatcher
21 in regards to the driver of the vehicle, the possible driver.
22 We then went over and made contact with the driver of the
23 vehicle.

24 Q And where was that contact made

25 A That was in the Albertson's parking lot.

1 for driving under the influence of alcohol, was a breath
2 test administered to him?

3 A No. It was not.

4 Q And why not?

5 A I asked Mr. Gemmill if he would submit to a breath
6 test, an intoxilyzer test. Mr. Gemmill would not take the
7 test.

8 Q And after that, was he transported to the Davis
9 County Jail?

10 A Yes. He was.

11 Q For about what period of time on this occasion did
12 you have Mr. Gemmill in your presence?

13 A Total time was approximately one hour.

14 Q And during that time, did you form an opinion as to
15 whether or not he was under the influence of alcohol?

16 A Yes. I did.

17 Q And what was your opinion based upon?

18 A The opinion was based upon several things; the
19 driving pattern, Mr. Gemmill's physical appearance, his
20 physical characteristics, the odor of alcohol, his demeanor,
21 the speech.

22 Q And what was your opinion?

23 A I felt that Mr. Gemmill was definitely under the
24 influence of alcohol.

25 MR. MAHAN: That's all of this witness, your Honor.

1 close as I can, you attempted to get a driving pattern; is
2 that correct?

3 A Yes.

4 Q What do you mean by that?

5 A Basically, I attempted to watch the vehicle to
6 see how or what kind of pattern it was driving, if it was
7 leaving the travel lanes.

8 Q I'm sorry. I--what I'm getting at is, what do you
9 mean by driving pattern? What does that have to do with a
10 driving pattern, per se?

11 THE COURT: Well, that's a double question. The
12 first one is, what do you mean by driving pattern?

13 MR. OLIVER: I'll withdraw the question, your Honor.

14 Q (By Mr. Oliver) Were you looking for anything
15 specific?

16 A Yes.

17 Q What was that?

18 A Watching--as I was saying, watching the vehicle to
19 see if it left the travel lane, if it crossed the lines.

20 Q And why was that?

21 A If it hit the curb.

22 Q And why was that?

23 A That's basically part of my job, it's part of--
24 it's used in detecting--a very useful tool in detecting
25 individuals driving under the influence of alcohol.

1 Q Is that what you suspected this vehicle of, or
2 this driver of, at that time?

3 A At the time, I didn't know.

4 Q But you were still looking for a driving pattern?

5 A Yes.

6 Q Did you have any reason to stop the vehicle at
7 this time?

8 A No. Not at that particular point.

9 Q Did you observe anything unusual in the manner in
10 which the vehicle was operating, between 900 South and 1500
11 South?

12 A I couldn't--

13 Q Did you observe anything unusual about the way
14 the vehicle was operating?

15 A As I testified earlier, I couldn't--I couldn't
16 see the vehicle well enough to make any real observations.

17 Q You didn't observe anything unusual?

18 THE COURT: Well, let him finish before you ask
19 him the next question, Mr. Oliver.

20 MR. OLIVER: I'm sorry, your Honor. He wasn't
21 being responsive to my question.

22 THE COURT: Well, let him finish. Then you can
23 make your objection, if you wish, but allow him that courtesy
24 of responding.

25 MR. OLIVER: Yes, your Honor.

1 THE COURT: It may have been responsive, it may
2 not; I can't tell where you're talking at the same time,
3 anyway.

4 MR. OLIVER: Excuse me, Officer.

5 Q (By Mr. Oliver) Did you observe anything unusual
6 about the way the vehicle was operated?

7 A No.

8 Q Did you observe anything unusual about when the
9 vehicle stopped at 15th South?

10 A Not when it stopped at 15th South, no.

11 Q Was there anything unusual when the vehicle pulled
12 into the Maverick Station there?

13 A The turn was rather quick, jerking almost.

14 Q What does that mean?

15 A The wheel was--it was almost as though the wheels
16 were jerked to the right. A rapid, it wasn't a normal,
17 flowing turn as a lot of vehicles make.

18 Q Some vehicles make quick, jerky movements for no
19 reason, some drivers?

20 A Usually, no.

21 Q No. I say, do some drivers?

22 A Some do, yes.

23 Q At that point, you hadn't observed anything
24 unusual sufficient enough to warrant stopping the individual;
25 is that correct?

1 A At that point, no.

2 Q So, you continued on by, rather than following the
3 individual into the Maverick Station; is that right?

4 A Yes.

5 Q Had you observed any actions of the driver which
6 had endangered the public?

7 A At that point, no.

8 Q Had you observed any actions of the vehicle which
9 appeared to be unsafe?

10 A No.

11 Q Had you observed Mr. Gemmill as the operator of
12 the vehicle?

13 A Yes. I did.

14 Q You had seen him and could identify him at that
15 point as being the operator of the vehicle?

16 A Yes.

17 Q When was that?

18 A As I passed him on 500 South Main east--westbound.

19 Q You later came in contact with the same vehicle;
20 is that correct?

21 A Yes.

22 Q Did you observe anything in the operation of the
23 vehicle during the second time you observed it, from 800
24 East to 500 South which endangered the public?

25 A No. No.

1 Q Did you observe any unsafe--

2 MR. MAHAN: Your Honor, I'm going to object to
3 that question. The--I think he said from 800 East to 500
4 South.

5 MR. OLIVER: Excuse me. To Main Street on 500
6 South. I'll rephrase it.

7 THE COURT: All right.

8 MR. OLIVER: Thank you.

9 THE WITNESS: No.

10 Q (By Mr. Oliver) Did you observe any unsafe
11 operation of the vehicle from 800 East to Main Street on 500
12 South?

13 A Had there been traffic on the roadway, there could
14 have been; but as the traffic was, no.

15 Q In the conditions then existent, did you observe
16 any unsafe operation of the vehicle?

17 A No.

18 Q While you were traveling down 500 South from 800
19 East, westbound to Main Street, approximately how close were
20 you following the vehicle?

21 A Two to three car lengths.

22 Q At what speed was that?

23 A Again, we were fluctuating. The speed was varying
24 from 15 miles an hour up to 30.

25 I should clarify that I did get closer to the

1 vehicle at 400 East.

2 Q Within two or three car lengths?

3 A At 400 East, yes.

4 But at that time, I remained in the left lane and
5 the driver remained in--or Mr. Gemmill's vehicle remained in
6 the right lane.

7 Q At what point, did you contact Officer Kone?

8 A When I initially observed the vehicle and identified
9 it as being the same vehicle.

10 Q And what did you say to him?

11 A I had had a discussion with Corporal Kone earlier.

12 Q What did you say to him on the radio at this
13 occasion?

14 A Exactly?

15 Q Yes.

16 A I don't know.

17 Q What was the gist of the conversation then?

18 A The gist was that I had located the vehicle I was
19 looking for earlier, and our location.

20 Q That you were looking for earlier?

21 A Yes.

22 Q You've indicated that when you got to Main Street
23 and Fifth South--well, at about 100 East and Fifth South,
24 how fast was Mr. Gemmill's vehicle traveling?

25 A Approximately 20 miles an hour.

1 had communication with the dispatcher?

2 A Yes.

3 Q What was that communication about?

4 A It was in regards to the registration information
5 on the vehicle, as listed on the computer. Also, the
6 driver's license information on the registered owner.

7 Q Is that routine, before you make a traffic stop,
8 especially one where you follow an individual for at least
9 eight blocks? Before you complete the traffic stop, to go
10 ahead and perform these checks?

11 A Sometimes.

12 Q Is it routine where you think that the individual
13 is unsafe in the public, to do that before making a traffic
14 stop?

15 A Sometimes. If the vehicle wasn't moving.

16 Q If you think the individual is unsafe and has the
17 ability to move, and become mobile and so forth, it is
18 routine, instead of initially responding and making your stop
19 and protecting the public,--

20 A Each situation--

21 Q --it's routine to check that out?

22 A Each situation varies from time to time. If the
23 time allows, for my own safety, I want to know as much about
24 that vehicle and driver as possible before I make contact
25 with it.

1 Q Did you run a warrant check on the registered
2 owner?

3 A That was part of the driver's license information,
4 yes.

5 Q And what did that come back?

6 A If I recall, there was no warrants.

7 Q At this point in time, though, you had observed
8 nothing that was unsafe in the operation of the vehicle; is
9 that correct? That's what you've testified to?

10 A Yes.

11 Q Was there something that you heard with regards to
12 what the dispatcher told you that made you want to talk more
13 adamantly to the driver of the vehicle?

14 A Yes.

15 Q Was there an outstanding warrant on the individual?

16 A No.

17 Q You've indicated that Officer Kone was in
18 Albertson's parking lot; is that correct?

19 A In the Sessions Place parking lot.

20 Q The whole parking lot's the same, isn't it?

21 A Yeah, basically.

22 Q Whereabouts was he parked there? Or where was he?
23 What was he doing?

24 A He would have been positioned somewhere in front
25 of Third Dimension, right close to there.

prudent--

2 THE COURT: He's unable to operate a motor vehicle
3 unsafely when--as a matter of law, when his nervous system,
4 brain or muscles, or his abilities of perception, coordination
5 or will or judgment are so affected as to impair to an
6 appreciable degree, his ability to operate the vehicle.

7 MR. OLIVER: I appreciate that, your Honor, but
8 that's not the instruction that is provided there. It just
9 talks about being under the influence and it doesn't talk
0 about--

1 THE COURT: Yes, in No. 9's the definition, or
2 No. 8's the definition of what that means.

3 MR. OLIVER: But it doesn't say anything about
4 operating a vehicle safely.

5 THE COURT: Well--

6 MR. OLIVER: When you read that, as you read that,
7 your Honor, it doesn't say anything there about operating a
8 vehicle safely. It talks about--

9 THE COURT: No. 7 and No. 8 construed together, I
10 think, meet the requirements of the law. You don't have a
11 proposed instruction anyway; is that correct?

12 MR. OLIVER: My proposed instructions, your Honor,
13 would simply include the fact that he--

14 THE COURT: Well, do you have one with you? Do
15 you have one prepared?